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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 423

MARYLAND CASUALTY COMPANY,
Petitioner,

vs.

THE SEMINOLE TRIBE OF FLORIDA, INC., CITIZENS NATIONAL BANK OF WEST HOLLYWOOD and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DWIGHT L. ROGERS, JR.
Counsel for Petitioner
400 First Federal Building
Fort Lauderdale, Florida

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 13, 1966.

CITATIONS TO OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals, printed in Appendix B hereto, has not been reported as of this date.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 13, 1966. (R-84.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Is an Indian corporation, engaged in commercial enterprise, immune from an ancillary garnishment action instituted by a judgment creditor of the Indian corporation because of the following provision appearing in the corporate charter:

To sue or be sued; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said corporation or the United States of America to the levy of any judgment, lien or attachment upon the property of The Seminole Tribe of Florida, Inc. other than income or chattels especially pledged or assigned.

Did the Secretary of the Interior in issuing the corporate charter to The Seminole Tribe of Florida, Inc. unlawfully qualify the waiver of immunity to suit of the latter and thereby discriminate against those persons who may be judgment creditors of The Seminole Tribe of Florida, Inc. and deny those persons the equal protection of the law?

Where The Seminole Tribe of Florida, Inc. pledged and assigned to the United States of America certain monies in a checking account but reserved the right to withdraw or draw on the monies did the United States of America have a prior right to the monies over a judgment creditor of the corporation who had garnished the monies?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved are Article 1, Section 8, Clause 3 and Amendment V. The statutory provision involved is 25 U.S.C.A., Indians, Section 477.

STATEMENT

THE SEMINOLE TRIBE OF FLORIDA, INC. entered into a contract for the construction of two buildings with Seldomridge Construction Company, which buildings are being used for a private commercial enterprise by THE SEMINOLE TRIBE OF FLORIDA, INC. This contract was approved by the Bureau of Indian Affairs. In connection with this contract MARYLAND CASUALTY COMPANY executed a Performance and Payment Bond wherein one of the conditions was that all labor and materials incorporated in the building would be paid. A sub-contractor who is not involved in this appeal was not paid and instituted a suit against MARYLAND CASUALTY COMPANY to collect the value of the materials he delivered to the job. MARYLAND CASUALTY COMPANY filed a third party complaint against THE SEMINOLE TRIBE OF FLORIDA, INC. alleging that THE SEMINOLE TRIBE OF FLORIDA, INC. had made improper payment of the construction money, and in particular made the final payment to the contractor knowing that the materialman had not been paid.

The case was tried without a jury and the court entered a judgment for the materialman and against MARYLAND CASUALTY COMPANY and in turn entered a judgment in favor of MARYLAND CASUALTY COMPANY and against THE SEMINOLE TRIBE OF FLORIDA, INC. for the amount of the materialman's claim.

After judgment was entered MARYLAND CASUALTY COMPANY instituted an ancillary proceeding in the form of garnishment against the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD who filed an answer admitting that the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD was indebted to THE SEMINOLE TRIBE OF FLORIDA, INC. in the amount of THIRTY-FOUR THOUSAND SIX HUNDRED SIXTY-FIVE and 80/100 DOLLARS ($34,665.80) as a result of a checking account in the name of THE SEMINOLE TRIBE OF FLORIDA, INC. The answer of the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD further referred to a deposit agreement and attached the deposit agreement between the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD, UNITED STATES OF AMERICA and THE SEMINOLE TRIBE OF FLORIDA, INC. to the answer.

The court entered an order dismissing the garnishment proceedings and dissolving the Writ of Garnishment against the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD on the grounds: (1) The Charter of THE SEMINOLE TRIBE OF FLORIDA, INC. prohibited the garnishment proceeding. (2) The funds which were garnished were assigned to the UNITED STATES OF AMERICA and consequently the UNITED STATES OF AMERICA had a superior right to the funds.

The Court of Appeals affirmed the order of the District Court.

REASONS FOR GRANTING THE WRIT

The questions presented are of vital importance and should be decided by this Honorable Court, not only because they involve United States constitutional provisions and a United States statute but because they involve the

rights and liabilities of an Indian corporation engaging in a business with private enterprise.

Counsel for the Bureau of Indian Affairs has informed your Petitioner that this is the first time that a judgment has ever been entered against an Indian corporation.

It is logical to forecast that Indian Tribes will incorporate in the future and that the Indian corporations heretofore formed and hereafter formed will continue to engage and will engage in private and commercial enterprise on a larger basis and in a greater volume as time passes, and therefore the questions presented need to be decided at this time in order that persons who will transact business with these Indian corporations will know their legal position with respect to enforcing their rights against these Indian corporations and can take steps to protect themselves from being placed in the unjust position that the Petitioner finds itself.

This is not a case where the Petitioner has taken unfair advantage of THE SEMINOLE TRIBE OF FLORIDA, INC. or where the latter did not have the benefit of counsel and supervision of the Bureau of Indian Affairs. All of the acts which made THE SEMINOLE TRIBE OF FLORIDA, INC. liable to the Petitioner were approved and done under the supervision of the Bureau of Indian Affairs or the local Indian agent and with the advice of local counsel. Thus this judgment represents an honest debt that should be enforceable.

To deny the enforceability of the judgment would be to place the Petitioner on an unequal basis under the law and deny the Petitioner due process of law. This was not the intent of Congress when they gave the Federal Government the paramount authority to control and manage the affairs of the Indian Tribes. The authority of the Federal

Government under Article 1, Section 8, Clause 3 of the Constitution to manage the affairs of the Indians must be exercised without discrimination and arbitrariness and with due respect to the due process clause of Amendment V of the Constitution.

QUESTION No. 1

Is an Indian corporation, engaged in commercial enterprise, immune from an ancillary garnishment action instituted by a judgment creditor of the Indian corporation because of the following provision appearing in the corporate charter:

> To sue or be sued; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said corporation or the United States of America to the levy of any judgment, lien or attachment upon the property of The Seminole Tribe of Florida, Inc. other than income or chattels especially pledged or assigned.

The Charter proviso does not specifically prevent garnishment and therefore MARYLAND CASUALTY COMPANY, a judgment creditor, may use the normal processes of law and garnish the funds of THE SEMINOLE TRIBE OF FLORIDA, INC., a judgment debtor.

If the word "attachment" as contained in the proviso is to be interpreted as encompassing the word and meaning of "garnishment", then in that event the proviso still contains no prohibition against MARYLAND CASUALTY COMPANY, the judgment creditor, attaching or garnishing the checking account of the judgment debtor, THE SEMINOLE TRIBE OF FLORIDA, INC.

By the very words of the Charter proviso itself, to-wit: "shall not be deemed a consent" the judgment debtor is not prohibited from doing anything, let alone being pro-

hibited to levy a judgment by garnishment or attachment. The proviso specifically neither negates nothing nor prohibits anything, for it is merely stating that it is not giving its consent.

If THE SEMINOLE TRIBE OF FLORIDA, INC. were a natural individual with a judgment duly entered against him then garnishment would lie. MARYLAND CASUALTY COMPANY has heard of no state in the United States, including in a corporate charter granted by a state, an immunity from levy of judgment by garnishment or attachment once the corporation may sue or be sued. The same holds true for national corporations.

Immunity does not follow as a matter of law, as a matter of fact and as a matter of national policy as applied to national corporations

In the Annotation to the Supreme Court Reports, 84 L.Ed. 730, Footnote 10 it states as follows:

> "As respects the forty government corporations listed in Keifer & Keifer v. Reconstruction Finance Corp., supra (306 U.S. 390, 391, 83 L.Ed. 789, 790, 59 S. Ct. 516), where Congress included the authority to 'sue and be sued', express prohibition against attachment and garnishment was provided in only two instances. They are the Federal Crop Insurance Corporation (February 16, 1938), 52 Stat. at L. 72, 73, Chap. 307, U.S.C.A., Section 1501, and the Farmer's Home Corporation (July 22, 1937), 50 Stat. at L. 527, Chap. 517, 7 U.S.C.A., Section 1014.

For the purpose of argument, assume that an individual Indian was the judgment debtor in lieu of the Indian corporation, could the judgment be enforced against an individual Indian? Petitioner has been unable to find any statutory law or case law which grants to an individual Indian immunity from suit and the incidental judicial processes that are available for the purposes of enforcing judgments.

QUESTION No. 2

Did the Secretary of the Interior in issuing the corporate charter to The Seminole Tribe of Florida, Inc. unlawfully qualify the waiver of immunity to suit of the latter and thereby discriminate against those persons who may be judgment creditors of The Seminole Tribe of Florida, Inc. and deny those persons the equal protection of the law?

The Act, 25 U.S.C.A., Indians, Section 477, does not provide for any sovereign immunity to be transferred to the corporations created thereunder. However, the Lower Court in effect stated that Indian corporations created under the Act in question are endowed with sovereign immunity from suit, which we feel is an erroneous conclusion.

Nothing contained in the enabling act specifically allows the incorporated tribe to sue and be sued but Congress certainly intended the corporation to sue and be sued when they expressly authorized the Secretary of the Interior and the tribe to include in the Charter rights "to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law." Certainly "powers as may be incidental to the conduct of the corporate business" include the power to sue and be sued.

It is not necessary for a legislative body, when creating a corporation or authorizing the organization thereof, to provide expressly that it shall have power to sue and be sued in order that it shall be subject to suit, for power to sue and be sued may be implied. *Kiefer* v. *Reconstruction*

Finance Corp., 306 U.S. 381-397. Moreover it has been held that the power to sue and be sued is an implied power of every corporation, including governmental corporations, and that the mere creation of a corporation confers the power to sue and be sued unless it is expressly withheld. Although it is customary to state the incidental powers of a corporation it is not necessary to do so. The grant of corporate existence in itself is the grant of power to sue and be sued. These incidents, unless expressly withheld, exist without specific enumeration. *Casper* v. *Regional Agriculture Credit Corporation*, 202 Minn. 433, 278 N.W. 896; see Annotation to Supreme Court Reports, 83 L. Ed. 808-809.

To grant the corporation the power to sue or to be sued means nothing if there is a limitation imposed on the execution of any judgment resulting therefrom.

The Lower Court refused to recognize any distinction between THE SEMINOLE TRIBE OF FLORIDA, INC. as a quasi-sovereign nation and the fact that the Respondent is a corporate entity, created for the purpose of transacting business for profit.

The lower Court bases its opinion primarily upon two cases, *Williams* v. *Lee*, 358 U.S. 217, 219 and *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 513. These cases are not pertinent to the questions involved in this case. These cases deal with the question of sovereign immunity of an Indian Tribe and whether a State Court has jurisdiction over an Indian Tribe. It is contended that the Lower Court erred in finding that these Indian corporations created for the purpose of engaging in business for profit possess the quasi-sovereign immunity that Congress endowed the Indian Tribes with years ago when they were considered nations

QUESTION No. 3

Where The Seminole Tribe of Florida, Inc. pledged and assigned to the United States of America certain monies in a checking account but reserved the right to withdraw or draw on the monies did the United States of America have a prior right to the monies over a judgment creditor of the corporation who had garnished the monies?

Petitioner's right to the funds that have been garnished is prior and superior to any claim, right or lien the UNITED STATES OF AMERICA may have to the funds. THE SEMINOLE TRIBE OF FLORIDA, INC. had control of the funds, and therefore any pledge or assignment of the funds under the document entitled General Assignment and Assignment of Income R-61 and Deposit Agreement R-56 were never perfected. The only right that the UNITED STATES OF AMERICA had in these funds was the right to make a written demand for the monies on deposit upon the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD in case THE SEMINOLE TRIBE OF FLORIDA, INC. defaulted under the loan agreement with the UNITED STATES OF AMERICA. The demand was made by the UNITED STATES OF AMERICA for the payment of these monies but this demand was not made until after the writ of garnishment was served upon the CITIZENS NATIONAL BANK OF WEST HOLLYWOOD.

In regards to the document entitled General Assignment and Assignment of Income, it provides that THE SEMINOLE TRIBE OF FLORIDA, INC. shall execute such specific assignments as may be requested from time to time which shows that it was the intention of the parties that this document would not constitute a specific assignment effective as of the time that it was executed, but that it was only an agreement to assign if an assignment was requested in the future.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DWIGHT L. ROGERS, JR.

DWIGHT L. ROGERS, JR.
Counsel for Petitioner